STATE OF NEW YORK
UNEMPLOYMENT INSURANCE APPEAL BOARD
PO Box 15126
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DECISION OF THE BOARD

Mailed and Filed: SEPTEMBER 26, 2022

IN THE MATTER OF:
Appeal Board No. 624113

PRESENT: MICHAEL T. GREASON, MEMBER

The Department of Labor issued the initial determinations, disqualifying the claimant from receiving benefits, effective December 3, 2021, on the basis that the claimant voluntarily separated from employment without good cause; and in the alternative, disqualifying the claimant from receiving benefits, effective December 3, 2021, on the basis that the claimant lost employment through misconduct in connection with that employment and holding that the wages paid to the claimant by prior to December 3, 2021, cannot be used toward the establishment of a claim for benefits. The claimant requested a hearing.

The Administrative Law Judge held a telephone conference hearing at which all parties were accorded a full opportunity to be heard and at which testimony was taken. There was an appearance by the claimant. By decision filed May 27, 2022 (), the Administrative Law Judge sustained the initial

determination of voluntary separation and did not reach the initial determination of misconduct.

The claimant appealed the Judge's decision to the Appeal Board.
Based on the record and testimony in this case, the Board makes the following

FINDINGS OF FACT: The claimant was employed as a registered nurse, part-time, at a hospital for over five years. The claimant has been a communicant of the Life Spirit Congregational Church since August 2021. The church believes that vaccination is an abomination.

On August 9, 2021, the employer notified the claimant of the need to be fully vaccinated for Covid-19 by December 3, 2021, or face discharge. The claimant declined the Covid-19 vaccination because of her personal religious beliefs. She requested and the employer denied the claimant a religious exemption from the vaccination.

The claimant suffers from a clotting disorder. The claimant's primary physician would not complete a medical exemption from the Covid-19 vaccination for the claimant. The claimant was not vaccinated for Covid-19 by December 3, 2021. The employer did not allow the claimant to continue to work after December 3, 2021, because she had failed to take the Covid-19 vaccination.

OPINION: The credible evidence establishes that the claimant's employment ended because she refused to receive the COVID-19 vaccination, a condition of her continued employment. The claimant was aware of the requirement and its applicability to her employment as a healthcare worker, a registered nurse. The claimant was also aware that employer, a hospital, could not allow her to continue to work after December 3, 2021, if she failed to comply with the mandate.

A provoked discharge occurs when a claimant voluntarily violates a legitimate, known obligation, leaving the employer no choice but discharge. A provoked discharge is considered a voluntary leaving of employment without good cause and constitutes a disqualification from the receipt of benefits. (See Matter of DeGrego, 39 NY2d 180 [3d Dept.1976]).

In the case herein, the obligation in question was compliance with the employer's vaccine requirement. The requirement was put in place to abide by New York State's mandate that all healthcare workers be vaccinated against COVID-19 during the worldwide pandemic. Courts have long held that New York State has the authority to regulate public health, including mandating vaccination to curb the spread of disease. (See Matter of Garcia v. New York City Dept. of Health & Mental Hygiene, 31 NY3d 601 [2018], which upheld mandated annual influenza vaccinations for children attending childcare programs in New York City; Matter of C.F. v. New York City Dept of Health & Mental Hygiene, 191 AD3d 52 [2d Dept 2020], holding that a municipal agency had the authority to require immunizations of adults in an area where there was an outbreak of measles if authorized by law; and Matter of New York City Mun. Labor Comm. v. City of New York, 73 Misc.3d 621 [Sup. Ct. N.Y. Cnty.

2021], where the Court declined to grant a temporary restraining order of the implementation of the New York City Department of Education's COVID-19 vaccine mandate for its employees, noting that there was no dispute that the Department of Health and Mental Hygiene had the authority to issue the mandate and that the Court "...cannot and will not substitute [others'] judgment for that of New York City's public health experts," citing New York State Inspection, Sec. & Law Enforcement Empls., Dist. Council 82 v. Cuomo, 64 NY2d 233, 237-40 [1984]).

As a result of the severity of the ongoing COVID-19 crisis and healthcare providers' need to protect the health of employees and patients, the emergency regulation, requiring all healthcare workers to be vaccinated against COVID-19, was justified by a compelling governmental interest. Therefore, we find that the employer's requirement that the claimant be vaccinated was a legitimate, known obligation and that the employer had no choice but to end the claimant's employment when she declined the vaccination. The claimant's decision to forgo a COVID-19 vaccination, despite the mandate to do so, and her awareness of the consequences for failing to do so, left the employer no choice but to terminate the claimant's employment.

As to the claimant's suggestion that she was denied a medical exemption, we find it significant that the claimant's primary physician would not complete a medical exemption on her behalf. Pursuant to 10 NYCRR

§ 2.61, a medical exemption would be afforded the claimant if a licensed

physician, physician assistant, or certified nurse practitioner certified that immunization with the COVID-19 vaccine would be detrimental to the health of the employee based on a pre-existing health condition. (See NYCRR § 2.61 [d]

[1]) The claimant also suggests, at hearing, that she would have considered the Comirnaty vaccination were it available. The Pfizer vaccine for Covid-19, now known as the Comirnaty vaccine, was approved by Federal Drug Administration as of August 2021, well before the claimant's separation of December 3, 2021.

As to her objection based upon religious concerns, the Supreme Court of the United States has held that "an individual's religious beliefs [do not] excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate." (See Employment Div. v. Smith, 494 US 872, 879

[1990]). The Court determined that, so long as the law is neutral and not aimed at a specific religion, generally applicable, and pertaining to an area of law that the government can regulate, it cannot be preempted by a religious practice. There is no allegation that the state cannot regulate the healthcare industry, that the law is not generally applicable to those in that industry, or that it targets a specific religion.

We note that the cases cited by the claimant, on appeal, are factually distinguishable from the circumstances herein. In so determining, we note that in Ballard v. United States (329 US 187 ([1946]), the Supreme Court dismissed an indictment when women had been improperly excluded from the related federal grand jury. In Cosme v. Henderson, (2000 US Lexis 16210 [SDNY 2000]), the Supreme Court determined that a reasonable accommodation for a federal employee did not require an accommodation of one's choice. Finally, in US v. Seeger (380 US 163 [1965]), the Supreme Court assessed whether conscientious objectors, seeking to be excused from the military, had qualified for such status under the Universal Military Training and Service Act. Therefore, the cases relied upon are neither relevant nor dispositive.

We note that the Second Circuit, in We the Patriots USA, Inc. v. Hochul, 2021 U.S. App. LEXIS 32921 (2d Cir 2021), upheld New York's COVID-19 vaccine mandate for hospital employees without allowing for religious exemptions. Additionally, the U.S. Supreme Court denied the petitioner's application for injunctive relief when the petitioners, hospital workers, challenged New York State's law removing religious exemptions from its COVID-19 vaccine mandate for hospital workers. Dr. A. v. Hochul, 142 S. Ct. 552 (U.S. December 13, 2021) (No. 21A145), cert. denied 142 S. Ct. 2569 (U.S. June 30, 2022) (No. 21-1143).

Finally, even if the doctrine of provoked discharge did not apply, the Court has held that a claimant, who fails to take a step that is reasonably required for continued employment, has left their employment without good cause. (See Matter of Wackford, 284 AD2d 770 [3d Dept 2001]). As the claimant was aware that her refusal to get vaccinated would result in separation from employment, we conclude that the claimant voluntarily separated from her employment under disqualifying circumstances. As the claimant voluntarily separated from her employment without good cause, the initial determination of misconduct need not be reached.

Lastly, although the claimant contends, on appeal, that the Judge denied the

claimant an adjournment for her attorney to appear, we note that the claimant's attorney was unavailable due to a personal obligation and that the claimant had knowingly waived her right to counsel.

DECISION: The decision of the Administrative Law Judge is affirmed.

The initial determination, disqualifying the claimant from receiving benefits, effective December 3, 2021, on the basis that the claimant voluntarily separated from employment without good cause, is sustained.

The claimant is denied benefits with respect to the issues decided herein.

MICHAEL T. GREASON, MEMBER